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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Docket No. 716

GENERAL TIME CORPORATION,

Petitioner,

—against—

TALLEY INDUSTRIES, INC., FRANZ G. TALLEY, M. KIMELMAN & CO., MICHAEL G. KIMELMAN, OSCAR KIMELMAN, DONALD D. HARRINGTON, individually, and as Chairman of the INDEPENDENT STOCKHOLDERS' COMMITTEE OF GENERAL TIME CORPORATION and AMERICAN INVESTORS FUND, INC.,

Respondents.

REPLY BRIEF OF PETITIONER GENERAL TIME CORPORATION

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REPLY BRIEF OF PETITIONER GENERAL TIME CORPORATION

I

In light of the statements by General Time Corporation ("General Time") at pages 3, 5 and 6 of its petition, asserting the false and misleading nature of respondents' proxy material, it is difficult to understand the contention by respondent Talley Industries, Inc. ("Industries") that "Petitioner nowhere disputes the correctness of * * * [t]he court's * * * determination that the proxy statement was

not false or misleading * * *" (Industries' brief, p. 11). We had thought this was what the case was all about: that the principal error below was the adoption of an erroneous and unworkable standard for determining the materiality of information omitted or misstated in proxy solicitation statements. That standard led the Court below to accept as adequate under SEC Rule 14a-9 a proxy statement which concededly:

> (1) Did not disclose to stockholders of General Time the coordinated and secret purchases by Industries and respondent American Investors Fund, Inc. ("Fund") of General Time stock through a common broker, and their close day-to-day working relationships, all of which enabled Industries to mount its proxy battle.
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> (2) Did not disclose to stockholders that Fund owned almost 10% of the outstanding stock of Industries, while also holding almost 10% of the outstanding stock of General Time. Its holdings of General Time stock resulted from acquisitions pursuant to an unlawful joint arrangement with Industries in violation of the Investment Company Act of 1940.
>
> (3) Affirmatively stated that there were no "arrangements or understandings" between Industries and Fund with respect to General Time stock contrary to facts and relationships going back as far as December 1967 (the existence of which was confirmed by the Securities and Exchange Commission in its Memorandum Opinion and Order of April 19, 1968; Appendix E to petition).
>
> (4) Did not disclose respondents' violation of the Investment Company Act of 1940, although that violation involved unlawful acquisitions of General

Time stock for the basic purpose of enabling Industries to take over General Time.

Under the erroneous standard adopted below, these omissions and misstatements were brushed aside, although as Circuit Judge Hays recognized in dissent, and common sense would affirm, they "were items of information that the stockholders [of General Time] were entitled to have when their proxies were being sought." (Appendix A to petition, p. 13a).

The foregoing information was relevant and material and injunctive relief was appropriate in these circumstances. This is now even clearer as a result of a decision handed down by the Seventh Circuit since this petition was filed on November 6, 1968. *Mills* v. *The Electric Autolite Company,* decided November 25, 1968, — F. 2d — (7th Cir. 1968), unofficially reported in CCH Sec. L. Rep. ¶92,306. *Mills, supra* is consistent with the proxy disclosure standard of the Eighth Circuit,* the Ninth Circuit** and represents further authority that directly conflicts with the standard adopted by the Court below.

In *Mills, supra,* the Court was concerned with the failure to disclose relationships similar to those existing in

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* See *Greater Iowa Corporation* v. *McLendon,* 378 F. 2d 783 (8th Cir. 1967), where the Eighth Circuit held (at 798) that the proxy rules require "full, fair and complete disclosure * * * [so that in] this struggle for corporate dominance or control, a meaningful choice should be presented to the security holder, who is in turn fully armed with a complete and fair disclosure of all relevant information pertaining to the exercise of his corporate suffrage."

** See *SEC* v. *Henwood,* CCH Fed. Sec. L. Rep. ¶91,125 (S. D. Cal. 1961), *mod. and aff'd.,* 298 F. 2d 641 (9th Cir.), *cert. denied,* 371 U. S. 814 (1962).

the instant case.* In affirming a "key finding" in the case, the Seventh Circuit explicitly recognized the paramount right of stockholders to the full disclosure of relevant information so that they might judge for themselves the effect of such information. Like Judge Hays, the Seventh Circuit found it unnecessary to speculate about the outcome of the mental processes of the stockholders in order to determine materiality. As the court said (CCH Fed. Sec. L. Rep. ¶92,306 at p. 97,451):

> "'These misleading statements and omissions were material in the sense that an average prudent investor ought to be informed of those relationships, in order to bring his own informed and independent judgment to the question of how much weight to give [statements made in proxy material] . . .'"

The *Mills* case is also instructive on the question of appropriate relief in the circumstances here. There the Seventh Circuit, after concluding "in agreement with the district court, that as a matter of law the proxy statement" violated the proxy rules, pointed out "that, if an injunction had been timely sought in advance of the shareholders' meeting for which the proxies were solicited, corrective measures would have been appropriate." *Mills, supra*, at p. 97,453.

Here General Time had sought injunctive relief on two separate occasions prior to its annual meeting of stockholders. Each time that relief was denied on the basis of the restrictive standard approved below—a standard all the more anomalous in denying materiality to information

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* Indeed, the instant case goes beyond the facts of *Mills*, since here, unlike *Mills*, the relationships and the course of conduct between Industries and Fund prior to and during the solicitation of proxies were themselves violative of law.

which was material enough to constitute a violation of law.

At a minimum this Court should review the instant case to resolve the conflict between the disclosure standard of the Court below and that of the Seventh, Eighth and Ninth Circuits. The confusion that now exists can only affect adversely the interest of stockholders in the free-flow of information.

II

Both the Court below and Industries have also erroneously relied upon *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432-33 (1964), to support the contention that "some force" may be given to SEC clearance of proxy material:

> ". . . despite Rule 14a-9(b), some force can be given to the the SEC's clearance of the Proxy Statement in a case such as this where the omissions were of facts well known to it [SEC] as a result of the contemporaneous Rule 17d-1 application." (Appendix A to Petition, p. 8a; Industries' brief, p. 15)

The Court and Industries each disregarded the fact that the SEC adopted Rule 14a-9(b) on January 7, 1966, well after *J. I. Case Co.* v. *Borak* had been decided.* The language of the Rule itself could not be clearer:

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* As a matter of fact, the Court below and Industries misconstrued this Court's holding in *J. I. Case Co.* v. *Borak*, *supra*, that the SEC accepts at "face value" representations in proxy material "unless contrary to other material on file with it" (Id. at 432-33). The Court's reliance upon Industries' Rule 17d-1 application was improper since that application was not even filed with the SEC until after the proxy contest was underway, and was not contrary to respondents' proxy material. The reality was that both respondents' appplication and their proxy material contained the same self-serving, but false, disclaimers as to any arrangements with respect to General Time stock.

"(b) The fact that a proxy statement, form of proxy or other soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made."*

III

The Court below contravened the requirements of the proxy rules by giving evidential weight to the purported nonaction of General Time to excuse the nondisclosures of respondents, thus placing a proxy contestant in a substantial dilemma: it must either disseminate information that is possibly incomplete or even erroneous because it is not within its own personal knowledge, or risk forfeiting its rights to challenge the inadequacy of the other side's proxy materials.

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* At the time of its adoption, the SEC made clear the purpose of Rule 14a-9(b):

"Rule 14a-9 (17 CFR 240.14a-9). This rule, which relates to false or misleading statements in proxy solicitations, has been amended to state specifically that the filing of proxy material with the Commission or the examination of such material by the Commission is not to be deemed a finding by the Commission that such material is accurate or complete or not false or misleading or that the Commission has passed upon the merits of the statements contained therein or any matter to be acted upon by security holders. Representations to the contrary are prohibited. The purpose of the new requirement is to forestall representations that the Commission by its review and 'clearing' of proxy material has approved the material or the proposals contained therein. The new provision merely makes explicit the Commission's long-standing construction of the proxy rules." 31 F.R. 211, January 7, 1966.

General Time had available during the course of the proxy contest only Industries' self-serving Rule 17d-1 application to the SEC. General Time certainly should not have been required, at its peril, to make contrary statements to its stockholders based primarily on its belief and speculation as to what were the true facts.

Indeed, when established facts first became available to General Time by reason of the SEC's findings and formal determination on Friday, April 19, 1968 at 5:00 P.M., General Time immediately made extensive efforts (e.g., by newspaper advertisements) to disseminate information with respect to respondents' violation of law.* By contrast, Industries made no attempt whatsoever, even after the SEC determination, to bring the violation or underlying facts to the attention of General Time stockholders.**

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* General Time's efforts were to no avail as it was too late to mail proxy soliciting materials to stockholders (and, of course, to receive any returns thereon) which would have enabled stockholders to vote or revoke their proxies. The difficulties of contacting the stockholders entitled to vote is manifest by the fact that substantial amounts of General Time stock were held in "street name" by brokers. Clearly, beneficial owners could not have been made aware of the violation in time to cast votes through their brokers in time for the annual meeting.

** All problems relating to the proximity of the SEC's determination on April 19th to General Time's annual meeting on Monday April 22nd resulted solely from respondents' unjustifiedly belated filing of their Rule 17d-1 application.

The petition of General Time for a writ of certiorari should be granted.

Respectfully submitted,

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